

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-2093

To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LYMAN T. SHEPARD.

Petitioner-Appellant,

-against-

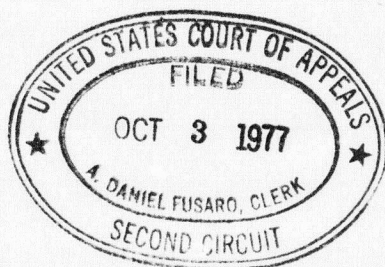
LARRY TAYLOR, Warden, Metropolitan
Correctional Center; and
MAURICE SIGLER, Chairman,
United States Parole Commission.

Respondents-Appellees.

Docket No. 77-2093

BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
THE SOUTHERN DISTRICT OF NEW YORK



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FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether it was error for the district court to vacate its June 14, 1977, order granting a writ of habeas corpus, since the June 14 order was correct and was not rendered moot by the subsequent decision of the Parole Commission to release appellant on parole.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This appeal is taken from orders of the United States District Court for the Southern District of New York (Tenney, J.) entered on June 24, 1977, vacating an order of June 14, 1977, which had granted a writ of habeas corpus, and from an order dated July 7, 1977, denying reargument.

The Legal Aid Society, Federal Defender Services Unit, continues as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

A. Prior Proceedings

In 1972, appellant was sentenced in the United States District Court for the District of Texas as a youth offender (18 U.S.C. §5010(b)) upon a conviction for interstate transportation of a stolen car (18 U.S.C. §2314). He was released on parole on April 18, 1974.

However, on December 17, 1974, he was convicted of armed robbery and sentenced by New York State to an indeterminate term of up to four years' imprisonment. A federal parole violation detainer was lodged against him, and he was arrested by United States marshals on December 15, 1976, when he was released on New York State parole. At that point, appellant's

lawyers began to prepare for his federal parole revocation hearing, and filed two petitions for writs of habeas corpus in connection with those proceedings. Each petition challenged a specific aspect of the parole revocation procedures employed by the Parole Commission. One petition challenged the application of the Parole Commission guidelines, rather than evaluation of appellant's rehabilitation, to determine when appellant should be released on parole (S.D.N.Y. 77 Civ. 187 (Owen, J.)); the other petition (S.D.N.Y. 77 Civ. 83 (Tenney, J.)) challenged the refusal of the Parole Commission to use its statutory subpoena power to obtain from New York State documents concerning appellant's rehabilitative advancement while in custody in state prison which were relevant and critical to the parole release determination. Both petitions were denied by the district judges.

B. This Court's Opinion and Order of May 27, 1977

A consolidated appeal from the orders denying the writs was prosecuted. On May 27, 1977, this Court reversed both orders (556 F.2d 648). With respect to the Parole Commission's guidelines, this Court held that it was a violation of the ex post facto provision to determine appellant's parole release date by use of the guidelines when, at the time his youth offender sentence was imposed, the standard for release was the degree of rehabilitation.

On the issue of subpoenas, this Court held:

... [S]ince the parolee's institutional record can be one of the most significant factors in predicting his ability to live peacefully in society, see Moody v. Daggett, [429 U.S. 78, (1976)], we believe that the Commission should reconsider its decision not to permit Shepard to subpoena his New York State parole file and its failure to require the presence of Mr. Haley [*] at the hearing. The appellant argues persuasively that the psychological reports in his state file are not "duplicative," see 1976 U.S. Code Cong. & Admin. News 367, and will contradict earlier profiles compiled when he violated his federal parole. Mr. Haley, Shepard contends, will supply details of the appellant's progress at Clinton and his testimony will significantly enhance the impact of the conclusory impressions recited in his letter to the Commission. We agree with the Government that neither the statute ... nor applicable regulations ... afford the appellant an unfettered right to "compulsory process." We, nevertheless, believe that in this unusual case any detailed evidence of institutional progress that will aid at the rehearing to predict Shepard's ability to readjust to society is relevant -- indeed crucial.

Shepard v. Taylor and Sigler,
supra, 556 F.2d at 654-655.

The order of this Court was as follows:

The judgments of the district court dismissing the petitions for a writ of habeas corpus are reversed with directions that the writ shall issue unless the U.S. Parole Commission conducts a hearing in accordance with this opinion within 14 days. The mandate shall issue forthwith.

Ibid.

*Mr. Haley was appellant's state prison caseworker.

C. Proceedings After This Court's Order

On the date of the decision, the mandate of this Court issued, and a copy was personally served by counsel for appellant on counsel for the Commission (Document #16 to the Record on Appeal at 3).

By a telephone call to David O'Connor, the post-release analyst at the Northeast Regional Office of the Commission on May 31, 1977, and by letter dated the same day, counsel for appellant requested issuance of Commission subpoenas for the New York State institutional records and for the appearance of appellant's state prison caseworker, Mr. Haley (Document #16 to the Record on Appeal at 3).

On Monday, June 6, 1977, appellant advised his counsel that he had been told that a hearing had been scheduled for June 10, 1977 (Document #16 to the Record on Appeal at 3). On June 8, 1977, the regional counsel for the Commission advised appellant's counsel that the requests for subpoenas had been denied. The reasons for the denial, related by telephone, were that

- (1) as [the Commissioner] had stated in his previous denial of the request, there were already letters and documents from the state prison in the file;
- (2) at the prior hearing held on January 11, 1977, there was extensive testimony from Shepard and his sister about his institutional rehabilitation which will be used at the newly scheduled hearing;
- (3) petitioner has failed to explain why Haley cannot write his statement; and
- (4) the Commission did not rely on unfavorable

federal psychiatric reports in making its first decision, and in any event has the information elicited from that January 11 hearing.

Document #16 to the Record on Appeal at 4.

Counsel also made the usual request to examine the file prior to the hearing. This request was also denied (Document #17 to the Record on Appeal at 3-4).

Based on the telephonically communicated reasons for the denial of subpoenas,* on June 10, 1977, appellant renewed his application for a writ of habeas corpus (Document #16 to the Record on Appeal), asserting that he was entitled to the writ because the Commission had failed to provide a hearing in accordance with the opinion of this Court, which required that the decision whether to release appellant on parole be made based upon rehabilitative achievements and which stated that an individual's institutional record is one of the most significant factors in predicting the ability of the individual to assume his place in a free society (Shepard v. Taylor and Sigler, supra, 556 F.2d at 654).

D. The Procedure Conducted by the Commission

The new hearing was held on June 10, 1977. After it began, appellant was told that one of the two hearing examiners

*The letter, dated June 8, 1977, did not arrive until June 13, 1977. A copy of the letter is annexed as D to the separate appendix to appellant's brief. The letter recites the same reasons as those given over the telephone.

at the hearing, Mr. Tenney, was the official who had signed the parole violation warrant for appellant's arrest (Document #17 to the Record on Appeal, affidavit of Gordon Johnson at 4). The parole file also contained a document showing that Tenney had recommended issuance of the warrant and that he had written at least three additional letters and memoranda concerning this case to New York institutional officials, federal probation officers, and United States marshals (Petitioner's Exhibit #1).

When appellant was advised of Mr. Tenney's involvement, he was also told that if he requested an adjournment of the hearing, it was unknown when another hearing would be scheduled (Document #17 to the Record on Appeal, Johnson affidavit at 4).

During the hearing, the examiners intensively questioned appellant about his custody in the New York State institution and the programs in which he had participated. Particular interest focused on the psychiatric and psychological counseling he had received, on his relationship with the prison psychiatrist, Dr. Reyes, and on his program at the institution. Because of the denials of the subpoenas, appellant had no records or witnesses on which to rely for answers to these probing inquiries, and could present no independent evidence, apart from his own evaluation of himself, of his development and rehabilitation (Document #17 to the Record on Appeal, Johnson affidavit at 2).

During the hearing, the examiners stated that they wished to rely upon the hearing examiners' summary, but not the transcript, of a parole hearing held on May 10, 1977.* Appellant's attorney, Gordon Johnson, requested permission to confer with Phylis Skloot Bamberger. Mrs. Bamberger had represented appellant at the May 10 hearing, but was denied admittance to the hearing room on June 10. Mr. Johnson wished to confer with Mrs. Bamberger, who was outside the room, to ascertain the accuracy of the summary. The examiners refused to grant Mr. Johnson's request (Document #17 to the Record on Appeal, Johnson affidavit at 3).

At the conclusion of the hearing, the examiners were unable to reach a single decision on disposition, leaving the decision for the regional office.

E. Back to Court

On June 13, 1977, the district judge heard argument on the petition. Counsel advised the court, by affidavit and orally, of what had occurred at the hearing. Counsel restated appellant's position that the order of this Court had not been complied with because issuance of subpoenas had not

*The May 10 hearing was given by the Commission after the filing of appellant's brief in this Court on the appeal from the denial of the two original petitions filed in the district court. One of the points in that brief argued that an important document in the parole file had not been disclosed to appellant until after the January 11 hearing. The Commission granted the May 10 hearing to avoid the appellate issue.

been evaluated in accord with the standard set by this Court (Minutes of June 13, 1977, at 9). In opposition to the petition, the Assistant United States Attorney argued that subpoenas for New York State records had properly been denied because of the presence of reports from MCC, which made the New York State records cumulative (Document #22 to the Record on Appeal; Minutes of June 13, 1977, at 11). Counsel for appellant advised the court that the MCC reports could not have been considered by the Regional Commissioner in making the decision on the subpoenas because neither of the reports was in the possession of the Commission until June 9; indeed, one was not written until June 9 (Respondents' Exhibits A and B), whereas the subpoena requests were denied on June 8, 1977 (see letter to Judge Tenney dated June 13, 1977, Document # to the Record on Appeal).*

Counsel also argued that the hearing was not in accord with Morrissey v. Brewer, 408 U.S. 471 (1972), because the hearing examiner involved in the proceedings resulting in appellant's arrest (see Petitioner's Exhibit #1) and was the person who signed the warrant for his arrest (Document #17 to

*The Government also argued that on June 10 the hearing examiners had before them a full transcript of the January 11, 1977, hearing, which was the subject of the earlier court proceedings. This transcript, the Government argued, supplied the otherwise missing information at the June hearing. However, this Court itself considered the full transcript of the January 11 hearing and concluded that the transcript was not an adequate substitute for the missing materials.

the Record on Appeal; Minutes of June 13, 1977, at 6). Counsel also argued that the hearing procedure was improper because counsel was not permitted, prior to the hearing, to examine the May 10 hearing summary which was part of the parole file.

On June 14, 1977, Judge Tenney granted the writ of habeas corpus.* He concluded that the Court of Appeals required issuance of the subpoenas in this case. He also concluded that the hearing violated the standards of Morrissey v. Brewer, supra, and thus did not meet the implicit requirement of the order of this Court that the hearing to be held within 14 days be a constitutional one. Judge Tenney then ordered:**

Thus, the petition is granted and a writ of habeas corpus shall issue. The Court is mindful, however, that the parties may wish final clarification of the court of appeals' directives from that court itself. Accordingly, this Court will stay its writ to allow time for application to the court of appeals or a judge thereof. If no further stay is entered as a result of that application by June 21, 1977, the petitioner must be released.

Appendix B at 5.

On June 16, 1977, Judge Tenney released appellant from custody on his own recognizance.

By affidavit dated June 20, 1977, the Assistant United States Attorney, without a notice of motion, requested that

*Judge Tenney's opinion is annexed as B to the separate appendix to appellant's brief.

**Judge Tenney designated his opinion as an order. See Appendix B at 6.

Judge Tenney vacate his order granting the writ as moot because on June 17, 1977, the Parole Commission granted parole effective on that day.*

Counsel for appellant opposed the motion (see Documents #25, #15 to the Record on Appeal).

While the Government's motion was pending, on directions of the Regional Counsel of the Parole Commission, appellant was advised that he would be arrested if he failed to comply with the Commission's order that he report for parole.** Only after strenuous protests by counsel for appellant was the matter resolved.

On June 24, Judge Tenney vacated his order of June 14, finding that it was moot. The court concluded that the Commission's decision granting parole release achieved the result appellant desired and fulfilled the mandate of this Court.*** A subsequent motion by appellant to vacate the order of June 24 was denied on July 7, 1977, and this appeal ensued.

*This result was contrary to the opinion of both hearing examiners, one of whom would have granted release for July 1977, and one of whom would have put off another hearing until November 1977.

**The letter is E to the separate appendix to appellant's brief.

***The June 24 order of Judge Tenney is C to the separate appendix to appellant's brief.

ARGUMENT

THE ORDER OF JUNE 14 GRANTING THE WRIT OF HABEAS CORPUS WAS CORRECT AND WAS NOT RENDERED MOOT BY THE LATER DECISION OF THE COMMISSION; ACCORDINGLY, REVOCATION OF THE WRIT WAS ERRONEOUS.

A. The Decision and Order of this Court

The May 27, 1977, decision of this Court directed issuance of the writ unless its decision was complied with. The order means simply that in the event the Parole Commission failed to comply with the standards outlined in the opinion for deciding whether to issue subpoenas, appellant was to be released from all custody and control of both the prison and the Parole Commission. The order necessarily has this meaning since a federal court has no power to order a person to be released on parole. Billiteri v. United States Board of Parole, 541 F.2d 938, 944 (2d Cir. 1976). The power is limited to ordering a discharge from custody:

The district court, of course, has authority to review a decision by the Board, where the issue has been properly brought before the court in a habeas corpus proceeding, which shows an abuse of discretion on the part of the Board, resulting in an abridgement of the petitioner's constitutional rights. Clay v. Henderson, 524 F.2d 921, 924 (5 Cir. 1975). The only remedy which the court can give is to order the Board to correct the abuses or wrongful conduct within a fixed period of time, after which, in the case of non-compliance, the court can grant the writ of habeas corpus and order the prisoner dis-

charged from custody.

Billiteri v. United States
Board of Parole, supra, 541
F.2d at 944.

B. The District Court's June 14, 1977, Order

On June 14, 1977, after full argument about and exploration of the defects in the parole revocation hearing held on June 10, 1977, the district court found that the Commission had failed to comply with the opinion of this Court and that the hearing was constitutionally defective. Of course, under Billiteri v. United States Board of Parole, supra, the district court's order necessarily directed appellant's release from all custody, for the court had no power to grant any other kind of relief due to the Commission's failures.

Not only did the June 14 order and opinion grant appellant's release from all custody, but that opinion was correct. The Commission had indeed failed to consider whether to issue subpoenas in accord with the standards prescribed by this Court in its opinion. The critical considerations were whether appellant would "benefit from further treatment in an institution or other facility." This Court stated, as had the Supreme Court earlier in Moody v. Daggett, 429 U.S. 78 (1976), that a parolee's institutional record can be one of the most significant factors in predicting his ability to live peacefully in society. While this Court agreed that there was no unlettered right to "compulsory process,"

... in this unusual case any detailed evidence of institutional progress that will aid at the rehearing to predict Shepard's ability to readjust to society is relevant -- indeed crucial.

Shepard v. Taylor and Sigler,
556 F.2d 648, 655 (2d Cir.
1976).

As Judge Tenney stated in his opinion, these statements were a direction to the Commission to issue the subpoenas in this case because of its unique circumstances. This reading of the opinion is correct. However, even if it is viewed only as a direction to the Commission to reconsider, without necessarily dictating the decision to be reached, the Commission failed to comply with the order and decision of this Court. In its letter dated June 8, 1977, denying the subpoenas, the Commission stated that the subpoenas were denied because the parole file already contained letters and files from the state institution as well as the testimony from the January 11 hearing; that no showing had been made why the requested witness, Mr. Haley, could not write and send to the Commission whatever he had to say; and that unfavorable psychiatric reports in the file had not been considered in the Commission's decision to deny appellant parole after the January 11 hearing.*

*The letter is reproduced as D to the separate appendix to appellant's brief.

These reasons for the denial were a transparent basis to avoid compliance with this Court's opinion. The parole file contained no information about appellant's state institutional conduct except for the one-paragraph letter from his caseworker, Mr. Haley. That letter was before this Court when the May 27 opinion was written (Appendix G to appellant's brief in that case), and obviously this Court did not consider that letter an adequate substitute for more documentary information or for Haley's testimony. Neither can the Commission rely upon the transcript of the January 11 parole revocation hearing to avoid its responsibility. Like Mr. Haley's letter, that transcript was before this Court (Appendix N to appellant's brief in that case) when it concluded that the decision on subpoenas should be reconsidered.

Contrary to the Commission's position, that transcript reveals no evidence of official records or opinions supporting appellant's own contentions about his achievements. Further demonstrating the absurdity of the Commission's position is that while appellant's sister gave valuable information about appellant's family and her own opinion about appellant's personality, she had no personal knowledge of appellant's record at the state institution, and she gave no information about it other than what she had learned from appellant himself.

The third reason given in the Commission's letter -- that the unfavorable psychiatric reports had not been considered in making the release decision after the first hearing -- is, even

if true (see Carson v. Taylor, 540 F.2d 1156, 1163 n.6 (2d Cir. 1976)) irrelevant. The more recent **and** almost current psychiatric reports were directly relevant and critical to deciding whether further treatment in an institution or facility was required. There being no other reports containing that information in the parole file, there was no basis for refusing to obtain the state reports.

Apparently recognizing the weakness in making arguments to the district court which had already been rejected by this Court, at the time of oral argument on the renewed request for the writ and in his affidavit in opposition, the Assistant United States Attorney stated that the Commission's denial of subpoenas for state records was justified because more recent reports based on appellant's five-month stay at MCC were before the Commission. However, this argument is no better than the others made. The two reports (Respondent's Exhibits A and B*) were not before the Commission when the decision on the subpoenas was made on June 8, 1977: One was not received by the Commission until June 9, and the other was not even written until June 9. Furthermore, in its opinion, this Court was aware that information about appellant's five-month stay at MCC might be considered by the Commission in making its release decision. In fact, the opinion stated that it was expected that the MCC record would be considered.

*One was prepared by MCC caseworker Karen Amy, and the other by the MCC psychologist.

556 F.2d at 655, n.4. Even with this expectation, this Court held that the Commission should reconsider whether or not to issue subpoenas.

Thus, the Commission failed to follow the explicit direction of this Court. The defect does not stop there, however. When this Court ordered a new parole hearing, implicit in its direction was a hearing that was constitutional. Such a proceeding did not occur here.

Once the hearing began, appellant and his counsel learned that one of the hearing examiners, Mr. Tenney, was the parole official who had signed the warrant for appellant's arrest based on parole violations. It was later learned, and the district court was advised, that the same examiner had participated in the investigation of the parole case (Petitioner's Exhibit #1 in the district court). As Judge Tenney properly found, this is a clear violation of Morrissey v. Brewer, 408 U.S. 471 (1972).*

Nor did the Commission's intransigence stop with the denial of a constitutionally valid hearing. On June 8, 1977, counsel for appellant requested permission from the Regional Counsel of the Parole Commission to examine the parole file prior to the January 10 proceeding. This general procedure is followed for all hearings. The request was denied. When

*With undaunted arrogance, after he revealed that he had signed the warrant for appellant's arrest, the examiner announced to appellant that if he asked for an adjournment, there was no way of knowing when another hearing would be scheduled.

the hearing began on January 10, counsel requested that both attorneys -- Phylis Skloot Bamberger and Gordon Johnson -- who had, over the two years, represented appellant, be permitted into the hearing room. This request was denied, and Mrs. Bamberger was excluded. The combination of the refusal to permit examination of the parole file prior to the commencement of the proceeding and to permit appellant's second lawyer to enter the hearing room deprived appellant of effective representation of counsel because, during the course of the hearing, the examiners stated that they wanted to introduce the examiners' summary of a May 10, 1977, hearing,* but not the transcript of that proceeding. Mr. Johnson was not present at the May 10 hearing and could not verify the accuracy of the hearing examiners' summary. When he asked to consult with Mrs. Bamberger, who was present at the May 10 hearing and who was waiting outside the hearing room on January 10, the request was denied. Since a copy of the summary was not given to counsel and since there is no way of determining its accuracy, it is not known whether the examiners used incorrect information at the June hearing. Morrissey v. Brewer, supra; Carson v. Taylor, supra.

There can be no doubt that the Commission failed to comply with this Court's directions of May 27, 1977, and further

*The Parole Commission held this hearing when Shepard argued in his brief to this Court in the prior appeal that the complete parole file had not been disclosed for the January 11 hearing.

that the hearing was unconstitutional and unfair. Judge Tenney properly recognized that fact and granted the writ.

C. The order vacating the writ was erroneous.

When on June 14, 1977, the district judge granted the writ, he stayed his order until June 21, 1977, to give the Commission an opportunity to seek review in this Court. On June 20, 1977, the Assistant United States Attorney filed an affidavit before the district court stating that on June 17, 1977, the Commission had granted appellant parole effective on that day. Based on the Commission's decision, the Assistant asked the district court to vacate its order granting the writ as moot. On June 24, after the stay had expired and over the vigorous objection of appellant, the district court granted the Government's motion, and subsequently denied appellant's motion to vacate that order. The district judge concluded that his order granting the writ was moot.

The finding of mootness is incorrect. Since the district court's order of June 14 released appellant from all custody and control, see Billiteri v. United States Board of Parole, supra, there was nothing for the Parole Commission to act upon on June 17 when it issued its decision. Furthermore, the stay of the district court order did not affect its validity. The court's decision was "so ordered," and was thus a final determination which terminated the action. Catlin v. United States, 324 U.S. 229, 233 (1945); The Washington, 16

F.2d 206, 208 (2d Cir. 1926); 10 Wright, FEDERAL PRACTICE AND PROCEDURES §2651 (1973). The stay pending appeal does not affect the judgment -- only its enforcement. See 11 Wright, FEDERAL PRACTICE AND PROCEDURES §2901 at 308 (1973); see Rule 62, Federal Rules of Civil Procedure.

It appears from the preamble to the district court's order vacating the writ that the finding of mootness was grounded on the contention that the Commission's decision releasing appellant on parole satisfied his requested relief. However, this Court had directed issuance of the writ if the Commission failed to comply with its May 27, 1977, order, and it has been "consistently held that an inferior court has no power or authority to deviate from the mandate issued by an appellate court." Briggs v. Pennsylvania Railroad Co., 334 U.S. 304, 306 (1948); Crane Co. v. American Standard, Inc., 490 F.2d 332, 341 (2d Cir. 1973). The district court is bound by the mandate of the appellate court, and must act in strict compliance with it. Other relief may not be substituted for that ordered by the appellate court. Thornton v. Carter, 109 F.2d 306, 319-320 (8th Cir. 1940), and cases cited therein. Thus, since it is indisputable that compliance with the order of this Court was not made, the writ should have issued.

Furthermore, although in his original application to the court petitioner asked for vacatur of the parole warrant and restoration to parole because the Commission had failed to issue the requested subpoenas, appellant's co-ordinate habeas

corpus application, S.D.N.Y. 77 Civ. 387, sought his outright and complete release from custody. Further, upon consolidation of the habeas corpus proceedings on appeal, appellant reiterated his requested relief as issuance of the writs and release from custody. See brief for appellant in Shepard v. Taylor and Sigler, Doc. Nos. 77-2030/1, at 55, 68-69. This Court agreed that issuance of the writ releasing petitioner from custody was the proper remedy if the Commission failed to hold a proper hearing. Slip op. at 3891. Indeed, no other remedy was possible under Billiteri v. United States Board of Parole, supra.

The Parole Commission's apparently deliberate action to subvert the order of this Court resulted in its failure to comply with the explicit and implicit mandate of May 27, 1977. The failure of the district judge to adhere to his original order granting the writ was therefore error. The adverse effect of the erroneous decision on appellant is clear -- he is under parole supervision rather than free from all custody.

CONCLUSION

For the foregoing reasons, the June 24, 1977, order of the district court vacating its June 14 order, which granted the writ of habeas corpus, should be reversed and vacated and the writ issued.

Respectfully submitted,

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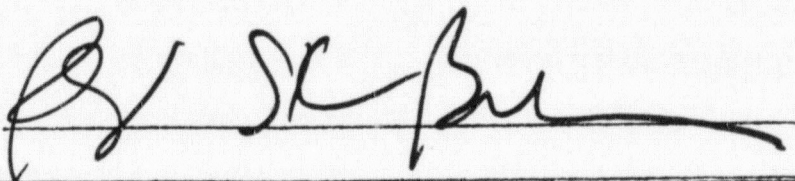
PHYLIS SKLOOT BAMBERGER,

Of Counsel.

CERTIFICATE OF SERVICE

October 3, 1977

I certify that a ^{corrected} copy of this brief [REDACTED] has been mailed to the United States Attorney for the Southern District of New York.

A handwritten signature in cursive script, appearing to read "By SK Bu", written over a horizontal line.

